Nos. 88-5014
88-5158

Supreme Court, U.S.
FILED
FEB 22 1989
JOSEPH F. SPANIOL, JR.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

JOSE GOMEZ and DIEGO CHAVEZ-TESINA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONERS

BURTON H. SHOSTAK
Moline, Ottsen, Mauze'
Leggat & Shostak
11 So. Meramec, #1010
St. Louis, Missouri
63105
(314) 725-3200

On Behalf of Amicus
Curiae,
National Association of
Criminal Defense Lawyers

Nos. 88-5014
88-5158

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

JOSE GOMEZ and DIEGO CHAVEZ-TESINA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONERS

BURTON H. SHOSTAK
Moline, Ottsen, Mauze'
Leggat & Shostak
11 So. Meramec, #1010
St. Louis, Missouri
63105
(314) 725-3200

On Behalf of Amicus
Curiae,
National Association of
Criminal Defense Lawyers

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4

I.

THE DELEGATION BY UNITED STATES DISTRICT JUDGE JOSEPH M. McLAUGHLIN TO A FEDERAL MAGISTRATE OF THE JURY SELECTION IN PETITIONERS' FELONY TRIAL WAS NOT AUTHORIZED BY THE MAGISTRATES ACT, 28 U.S.C. § 636.

II.

FEDERAL CRIMINAL DEFENDANTS WHO ARE TRIED UPON FELONY CHARGES POSSESS THE PERSONAL RIGHT TO HAVE AN ARTICLE III JUDGE ADMINISTER, CONDUCT AND OVERSEE THE VOIR DIRE PROCESS AT SUCH TRIAL. A FEDERAL DISTRICT JUDGE'S DELEGATION OF VOIR DIRE ADMINISTRATION TO A FEDERAL MAGISTRATE DENIES THE DEFENDANT OF HIS RIGHTS UNDER ARTICLE III, AND THEREFORE TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

CONCLUSION	20
CERTIFICATE OF SERVICE	21

QUESTIONS PRESENTED

I.

DOES THE MAGISTRATES ACT AUTHORIZE A DISTRICT JUDGE, OVER A CRIMINAL DEFENDANT'S OBJECTION, TO DELEGATE JURY SELECTION IN A FELONY TRIAL TO A MAGISTRATE WHILE RESERVING AUTHORITY TO REVIEW DE NOVO THE MAGISTRATE'S RULINGS ON CHALLENGES FOR CAUSE?

II.

DOES A DISTRICT JUDGE'S DELEGATION OF JURY SELECTION TO A MAGISTRATE, WITH THE RESERVATION OF A DE NOVO REVIEW AUTHORITY CONCERNING UNSUCCESSFUL DEFENSE CHALLENGES FOR CAUSE, VIOLATE A FELONY DEFENDANT'S ARTICLE III AND DUE PROCESS RIGHTS?

TABLE OF AUTHORITIES

CASES

Authority	Page
Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed 2d 69 (1986)	10
Kettenbach v. United States, 202 F. 377, 385 (9th Cir. 1913)	16
McClesky v. Kemp, 481 U.S. ___, 107 S.Ct. 1756, 95 L.Ed 2d 262 (1987)	10
Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed 2d 78 (1982)	17
Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed 2d 759 (1965)	10
Teague v. Lane, ___ U.S. ___, 99 L.Ed 2d 268 (1988)	10
United States v. Ford, 824 F.2d 1430 (5th Cir. 1987)	9, 13
United States v. Trice, No. 87-2452, Slip Op. at 8, 9 (8th Cir. Dec. 29, 1988)	6, 9 10, 11

CONSTITUTIONAL PROVISIONS

U.S. Cont. art. III	2, 9, 14-18, 20
U.S. Const. amend V	15
U.S. Const. amend VI	9

STATUTES

28 U.S.C. § 636	4-7, 11

OTHER AUTHORITIES

75 Am. Jur. 2d Trial § 45 (1974)	9
L. Blue & J. Naida, Jury Selection: Strategy & Science § 6:01, 6:11 (1986)	18
H. R. Rep. No. 1609, 94 Cong. 2d Sess. 10, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6172	12

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a nation-wide membership of more than 5,000 lawyers. The NACDL was founded over 25 years ago to advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of criminal defense lawyers.

Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice. The NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of these objectives, and of the

criminal justice system, is the protection of an individual's constitutional rights to an Article III judge to preside over the defendant's felony trial and to due process of law.

The decisions of the United States Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York present a threat to the aforementioned rights. This brief supports the petitioners' arguments that the decisions below should be reversed and petitioners granted a new trial with a United States District Judge Presidinganer the voir dire examination.

Both parties have consented to the filing of this amicus curiae brief.

SUMMARY OF ARGUMENT

The United States District Court for the Eastern District of New York should not have delegated to a federal magistrate the administration of voir dire in petitioners' felony trial. Such delegation is in direct violation of the Magistrates Act, Article III, and the Due Process clause of the Fifth Amendment.

Voir dire is not a "pretrial matter" within the scope of the authority vested in federal magistrates. Voir dire is an element of the "traditional adjudicatory duties" of Article III district judges.

Due process demands that Article III district judges administer voir dire in felony trials to ensure the fundamental fairness of such trials.

ARGUMENT

I.

THE DELEGATION BY UNITED STATES DISTRICT JUDGE JOSEPH M. McLAUGHLIN TO A FEDERAL MAGISTRATE OF THE JURY SELECTION IN PETITIONERS' FELONY TRIAL WAS NOT AUTHORIZED BY THE MAGISTRATES ACT, 28 U.S.C. § 636.

The first question presented to this Court is whether the Magistrates Act authorizes United States district judges to delegate jury selection duties in felony trials to federal magistrates. The NACDL, as amicus curiae on behalf of petitioners, respectfully submits to this Court that the Magistrates Act does not authorize federal magistrates to conduct the voir dire process in federal felony trials.

Section 636(b) of the Magistrates Act grants federal magistrates four powers. First, a federal magistrate may hear and

determine, with certain exceptions, any pretrial matter. The magistrate's determination is then subject to district court review under a clearly erroneous standard. 28 U.S.C 636(b)(1)(A). Second, a federal magistrate may conduct evidentiary hearings and make findings for disposition of certain matters in both criminal trials and post conviction relief proceedings. The district judge retains a de novo power of review over the magistrate's findings or recommendations. 28 U.S.C. § 636(b)(1)(B). Third, a district judge may assign to a magistrate "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. §636(b)(3). Finally, the federal magistrate may serve as a special master under certain statutes or by consent of the

parties to a civil action. 28 U.S.C. § 636(b)(1). Ultimately, the Magistrates Act is silent as to the authority of a federal magistrate to conduct the voir dire in a felony case. United States v. Trice, No. 87-2452, slip op. at 8, 9 (8th Cir. Dec. 29, 1988).

In order to determine whether the Magistrates Act authorizes federal magistrates to conduct voir dire in felony cases, two basic inquiries become necessary: (1) whether the phrase "pretrial matter" as used in § 636(b)(1)(A) is construed broadly enough to encompass voir dire duties in felony cases, and (2) whether allowing a magistrate to conduct voir dire in a felony case delegates a duty inconsistent with the Constitution and laws of the United States.

The NACDL respectfully contends that administration of voir dire in federal felony trials is not a "pretrial matter" under § 636(b)(1)(A). The pretrial matters envisioned by the statute deal with duties which are largely fact gathering and ministerial in nature, i.e. pretrial suppression hearings and 28 U.S.C. §2254 evidentiary hearings. The important distinction between such pretrial matters and voir dire is that pretrial matters envisioned by the Magistrates Act are subject to subsequent scrutiny by the district judge during his administration of the actual trial itself or determination of the merits of the habeas corpus petition. Voir dire, on the other hand, is a purely personal and subjective task, especially within the criminal justice system where the district judge more often than not actually performs the examination of the

potential jurors. In handling voir dire the district judge is faced with not only the questioning of potential jurors but with receiving those jurors' responses, be they verbal or physical. There is much in the transcript which is incapable of being recorded. Certain mannerisms of the panel members, their tone of voice in responding, and their attitudes in general can only be perceived by the district judge as he administers the voir dire. The cold transcript record cannot provide adequate subsequent district judge review of voir dire proceedings.

Despite the purely personal nature of voir dire administration, the very basis of voir dire within our legal system demands that the administration of voir dire be conducted by a district judge rather than a magistrate. "A legal trial at common-law

presupposes and generally is predicated upon the presence at all stages thereof of a presiding justice under whose direction the case is tried." 75 Am. Jur. 2d, Trial §45 (1974). Furthermore, "the importance of voir dire to the American legal system is tied to the role juries play in our legal system, as well as the interplay between judge and jury." Trice, supra at 12.

> "At common law only the judge could preside over jury selection in felony cases... [S]uch concern plainly rejects the view that jury selection is a preliminary and essentially ministerial act. At the least it is an essential instrument to the delivery of a defendant's constitutionally secured right to a jury trial rooted in the commands of due process, if not the trial guarantees of the Sixth Amendment in Section 2 of Article III themselves."

United States v. Ford, 824 F.2d 1430, 1435 (5th Cir. 1987).

Moreover, "[e]lements of voir dire continue to implicate greater societal rights... [v]oir dire communicates to the people by satisfying the axiom that to perform its highest function in the best way justice must satisfy the appearance of justice." Trice, supra at 13 (citations omitted). This aspect is readily evident in this Court's decisions of Batson v. Kentucky, 476 U.S. 79 (1986), Swain v. Alabama, 380 U.S. 202 (1965), McClesky v. Kemp, 481 U.S. ___, 95 L.Ed.2d 262 (1987), Lockhart v. McCree, 476 U.S. 162 (1986), and this Court's recent grant of certiorari in the case of Teague v. Lane, ____ U.S. ____, 99 L.Ed.2d 268 (1988). As Circuit Judge Heaney of the United States Court of Appeals for the Eighth Circuit stated in the majority opinion in Trice

> "[u]nder both a historical light and a light cast by Supreme Court opinions, jury selection plays a

vastly greater role than merely assuring defendants' rights... [s]ince voir dire plays broader societal roles, we suspect that Congress did not intend to treat voir dire as simply preliminary. Voir dire is largely related to the task of deciding cases, similar to the matters excepted to subparagraph (A), [28 U.S.C. 636(b)(1)(A)] rather than the task of either fact gathering or charging, similar to matters traditionally envisioned by subparagraph (A). Subparagraph (A) was plainly intended for less important matters than voir dire."

Trice supra, at 14-15.

Therefore, in light of the importance of voir dire to the felony trial as a whole, the subjective and personal nature of the administration of voir dire, and the impracticability of adequate review by district judges of "magistrate-administered" voir dire proceedings, the voir dire process cannot be considered a "pretrial matter" as envisioned by the Magistrates Act.

The NACDL also contends that the administration of voir dire by a federal magistrate is inconsistent with the Constitution and laws of the United States. Although Congress intended district judges to experiment freely in delegating duties to federal magistrates, the delegation of voir dire was not within Congress' contemplation when revising the Magistrates Act in 1976. Congress noted that experimentation by district judges would increase the time available to judges "for the careful and unhurried performance of their vital and traditional adjudicatory duties." H.R. Rep. No. 1609, 94 Cong. 2d Sess. 10, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6172 (emphasis added). The key phrase to the congressional intent underlying the Magistrates Act is "traditional adjudicatory duties." As Circuit Judge Higginbotham of the United

States Court of Appeals for the Fifth Circuit has stated,

> "[t]he trial lawyer knows that who decides the truth from the evidence may be as important as the evidence. The process of selecting the persons to hear the evidence inevitably introduces the trial players to the jury and itself triggers the decisional process. We have secured the rights to the selection process as an essential part of trial by jury and struggled to eliminate bias in its function.
>
> It is then difficult to view jury selection as fit for delegation to magistrates as part of a congressional effort to free judges for performance of their 'traditional adjudicatory duty.' Rather, we see jury selection as such an integral component of trial that we are not persuaded that Congress envisioned its delegation to magistrates." Ford, supra at 1438.

Therefore, after analyzing the inquiries of "pretrial matters" and "traditional adjudicatory duties" it is clear that the Magistrates Act does not authorize district judges to delegate

administration of voir dire to magistrates. Although a federal magistrate may be as well suited to conduct voir dire as an Article III district judge, competency and legal knowledge are irrelevant to the issue of statutory authorization which is present here. The Magistrates Act goes neither to the experience nor the knowledge of the magistrate; rather, Congress has seen fit to preserve the criminal defendant's right to an Article III district judge administering the voir dire in his felony trial.

II.

FEDERAL CRIMINAL DEFENDANTS WHO ARE TRIED UPON FELONY CHARGES POSSESS THE PERSONAL RIGHT TO HAVE AN ARTICLE III JUDGE ADMINISTER, CONDUCT AND OVERSEE THE VOIR DIRE PROCESS AT SUCH TRIAL. A FEDERAL DISTRICT JUDGE'S DELEGATION OF VOIR DIRE ADMINISTRATION TO A FEDERAL MAGISTRATE DENIES THE DEFENDANT OF HIS RIGHTS UNDER ARTICLE III, AND THEREFORE TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Much of the controversy concerning a federal magistrate's administration of voir dire in felony trials revolves around the Magistrates Act. However, the NACDL contends that even if this Court determines that the Magistrates Act authorizes magistrates to conduct voir dire in felony cases, federal defendants being tried on felony charges have the personal right to an Article III judge who will conduct voir dire, and that a deprivation of this right denies the federal defendant due process under the Fifth Amendment.

This contention is not grounded in congressional intent; rather, such argument focuses on the fundamental fairness of the federal defendant's trial when he is denied his right to an Article III judge at voir dire.

> "The trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the truth, and to attaining justice between the parties. It is his duty to see that the issues are not obscure, that the trial is conducted in a proper manner, and that the testimony is not misunderstood by the jury, to check counsel in any effort to obtain an undue advantage or to distort the evidence, and to curtail an unnecessarialy long and tedious or iterative examination or cross-examination of witnesses. He has the authority to interrogate witnesses and to express his opinion upon the weight of the evidence and the credibility of the witnesses." Kettenbach v. United States, 202 F. 377, 385 (9th Cir. 1913).

Additionally,

> "Due Process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, 455 U.S. 209, 217 (1982) (emphasis added).

It is against the backdrop of the above two quotations that the need for the safeguard of an Article III judge conducting voir dire becomes readily evident. Fundamental fairness is an illusive inquiry, one which practically demands contemporaneous perception of the events in question. It is for this reason that review of voir dire, even under a de novo standard, is impracticable. A district judge cannot adequately review the fundamental fairness of voir dire by merely reading the transcript of such proceedings

or reviewing the questions presented to the jurors.

> "Nonverbal communication is extremely important when assessing juror desirability because it may provide invaluable information about the juror personally and how that prospective juror feels about the case at hand...
>
> Every attorney should be sensitized to the messages sent by body language so as not to pass up an important opportunity to gain invaluable information about prospective jurors as well as every other participant in the trial process.
>
> The cues sent by the body are truly 'language.' They can communicate the thoughts, intentions and desires of the persons sending them." L. Blue & J. Naida, Jury Selection: Strategy & Science § 6:01, 6:11 (1986).

Therefore, fundamental fairness and due process require the Article III judge who is to hear the evidence in the criminal trial to also conduct the voir dire examination because the judge must be able

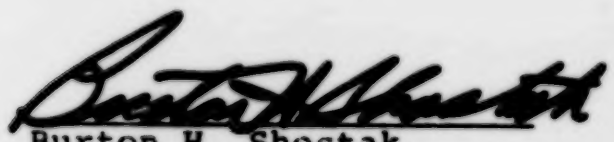
to examine the potential jurors by both their actions and words, and for the reason that any attempted review of voir dire proceedings on a de novo basis, absent plain error, would be inadequate.

CONCLUSION

For the foregoing reasons and authorities in support thereof the decision of the United States Court of Appeals for the Second Circuit should be reversed and this cause be remanded to the United States District Court for the Eastern District of New York for a new trial with directions to the district court that the voir dire be conducted by an Article III judge.

Respectfully Submitted

MOLINE, OTTSEN, MAUZE',
LEGGAT & SHOSTAK



Burton H. Shostak
11 So. Meramec
Suite 1010
St. Louis, MO 63105
(314) 725-3200

On Behalf of Amicus
Curiae, National
Association of Criminal
Defense Lawyers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing "Amicus Curiae Brief of the National Association of Criminal Defense Lawyers in support of the petitioner" have been furnished by U.S. mail to: (1) Joel B. Rudin, Attorney for Jose Gomez, 45 Rockefeller Plaza, Suite 730, New York, New York 10111, and (2) Jerald Levine, Attorney for Diego Chavez-Tesina, 73-19 Broadway, Jackson Heights, New York 11372, and (3) William C. Bryson, Acting Solicitor General, United States Department of Justice, Washington, D.C. 20530 on this 22nd day of February, 1989.

Burton H. Shostak